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February 8, 2017

The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania

Re: **U.S. v. Yu Xue, et al.**
16-CR-22
Response to Defendant's
January 30, 2017 Letter

Dear Judge Slomsky:

I am in receipt of the defendants' letter dated January 30, 2017 in which they request a hearing to discuss certain discovery issues. In anticipation of such a hearing, the government can provide the following information.

A. Discovery Hard Drives

Pursuant to the Court's Protective Order, counsel for each defendant have submitted hard drives to the government. The FBI has loaded the discovery, including all of the alleged trade secret and confidential documents, onto these hard drives and delivered them to defense counsel. As we discussed during the protective order litigation, the hard drives contain several terabytes of data, which is an immense amount of information. The material is organized by defendant and seized device (i.e., Yu Xue computer, Tao Li thumb drive, etc...). Therefore, the FBI provided an index to the computer folders so that defense counsel could quickly find the seized device they wished to view.

The FBI prepared the hard drives in the exact same manner as they do in every other criminal case. The hard drives contain the computer image files from the seized electronic devices. The image files are important because they contain all the metadata which might be relevant in any litigation. The hard drives also contain software called FTK Viewer which allows the data to be viewed, but not searched. To search the data, the defendants simply have to add software which will allow them to search and organize the data in the manner that is most useful to them. There are a number of different types of software programs which are commercially available. The FBI cannot provide this software to the defendants on the hard drives because the FBI's licensing agreement with the software companies do not permit that conduct.

In the alternative, there are many computer forensic companies which specialize in this type of consulting work. Some of these consultants are former FBI computer technicians who are experts in handling this exact type of imaged computers and data. These computer consultants can assist the defendants search and organize the data in whatever manner is most useful to them in order to prepare a defense.

This is the exact same procedure which is used in every criminal case. If the defendants cannot afford to purchase the necessary software or hire a computer consultant, then they can file a financial affidavit with the Court and the Court can hire a computer consultant on their behalf. For example, in United States v. Joseph Dougherty (the ironworkers' union RICO), the government provided several terabytes of data in discovery. Judge Baylson hired a computer forensic consulting company to assist the indigent defendants search and organize this data in preparation for trial. The non-indigent defendants were able to use this consulting company's services and paid a proportion of their fee. Other district court judges have made similar arrangements in other criminal cases with other computer forensic consulting companies. In this day and age when computer evidence is ubiquitous, this is the standard procedure.

B. Discovery Laptops

Pursuant to the Court's Protective Order, the FBI has purchased four laptop computers and loaded those computers with the discovery materials. At my request, the FBI loaded software onto these computers so that the defendants could search them. (Unlike the hard drives, the defendants cannot add software to or hire someone to organize the FBI discovery laptops.) These computers are ready to be used by the defendants to begin their review of the discovery materials. On January 9, 2017, I sent an e-mail to all defense counsel to begin scheduling discovery review sessions. To date, no counsel has contacted me to set up a discovery review schedule.

Counsel for Tao Li inquired if he could use the FBI discovery laptop (which contains the software to search the material) at his office here in Philadelphia outside the presence of his client who lives in San Diego. According to FBI legal counsel, defense counsel can use the discovery laptops (which are FBI property) in his office following standard FBI procedure to safeguard government property.

C. Discovery Issues

Since the hard drives were delivered to defense counsel, the government has been attempting to address any concerns raised by defense counsel. Shortly after receiving the hard drive, counsel for defendant Tao Li contacted the government and indicated that they were having problems finding certain documents seized from Tao Li's electronic devices. I invited counsel to meet in my office. On January 5, 2017, counsel for Mr. Li came to my office. During the meeting, the FBI demonstrated step by step how to find the documents they were seeking.

In addition, the FBI invited counsel to come to the FBI computer laboratory to use the FBI's computers and software to search the discovery materials. The FBI's computer laboratories have conference rooms for defense attorneys to use and review the discovery materials in private. Defense counsel could use the exact same software used by the FBI to search the discovery materials. To date, counsel has not requested to schedule such a review.

In their letter, defense counsel state that the size and format of the discovery materials is impacting their ability to effectively review them. There are a number of solutions available to resolve these issues.

1. The defendants can purchase the software necessary to search and organize the discovery materials in the manner most effective for their defense.

2. The defendants can hire a computer expert to assist them search and organize the discovery materials following the procedure for hiring expert witnesses set forth in the Protective Order.

3. If the defendants do not have the funds to pay for the software or hire an expert, they can submit a financial affidavit to the Court to petition for CJA funds for such purposes.

4. Defense counsel may use the FBI discovery laptops in the presence of their clients as provided in the Protective Order.

5. Defense counsel can request to use the FBI discovery laptops in their office following the FBI's procedure for safeguarding government property.

6. The defendants and/or defense counsel may go to a FBI computer laboratory to review the discovery materials and use the FBI's forensic software and search capabilities.

D. Expert Presentation

Prior to indictment, the government utilized the services of a team of GSK scientists and an independent expert, Dr. Joseph Villafranca, to review the stolen GSK materials and determine if any of those items contained trade secrets. The GSK scientists and Dr. Villafranca both opined that certain stolen documents did contain trade secrets as described in the indictment.

As noted in the defense letter, the defendants utilized the services of Dr. Robert Edwards who opined that certain stolen information alleged in the indictment as being trade secrets were not trade secrets because this stolen information had been previously released publically.[1]

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1 The government believes that the trade secret issue is a bit of a red herring. In the government's assessment, there is no question that the defendants did not have authority to take GSK's highly valuable information. Whether that stolen information is a "trade secret" or "confidential" is irrelevant to the most serious charges in the indictment. The government

Notably, Dr. Edwards did not opine that the stolen information was not confidential or that the defendants had authority to take and use the stolen GSK information. There were also a number of documents charged in the indictment in which Dr. Edwards did not contest the fact that they contained trade secret information. Although the government was under no legal obligation to do so, the government promised that it would respond in writing to Dr. Edwards's report.

Unfortunately, that process has taken significantly longer than initially anticipated. The government requested that GSK respond to Dr. Edwards's report. The GSK scientists have been reviewing the report and comparing the stolen information with the previously published information. The government anticipates that GSK will have a response in the near future. Once the government receives GSK's response, we will turn that over to the defendants.

In the meantime, the government has hired a second independent expert, Dr. Chester Meyers, to review the Dr. Edwards's report and compare the stolen trade secret information to the prior published material. The government hired Dr. Meyers because he specializes in this type of work. Dr. Meyers has reviewed the defense expert report and has been painstakingly comparing all available published material with the alleged stolen trade secret information. Many of these documents are scores of pages in length containing very specific scientific information. To make a line by line comparison is extremely time consuming. Understandably, this process has taken Dr. Meyers a considerable amount of time to complete.

When Dr. Meyers's report is finalized, the government will certainly provide that report to defense counsel. In the discovery materials, the government has already provided copies of the FBI reports of their interviews with the GSK scientists concerning their review of the trade

believes that the central issue in this case is valuation, as that will drive the sentencing guidelines. The trade secret issue does not necessarily shed any light on valuation. A trade secret document could be worth $1 while a "confidential" document could be worth $1 billion - or vice versa.

secret material. The government will supplement discovery with additional FBI reports as they become available.

Thank you for your time and attention to this matter.

Respectfully Submitted,

LOUIS D. LAPPEN
Acting United States Attorney

/s/
Robert J. Livermore
Assistant United States Attorney

cc: Peter Zeidenberg, Esq.
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